

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MICHAEL TAORMINA
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-49
Case No. 68-4859

S.S.A. No.

and

ROBERT N. AUSTIN
(Claimant)

Case No. 69-265

S.S.A. No.

In Case No. 68-4859, claimant Taormina appealed from Referee's Decision No. LB-15064 which held that the claimant was ineligible for benefits for 11 weeks beginning March 31, 1968 through June 15, 1968 under section 1252.1 of the Unemployment Insurance Code on the ground that he was not an unemployed commercial fisherman.

In Case No. 69-265, claimant Austin appealed to a referee from a determination of the Department of Employment which held that the claimant was ineligible for benefits for 13 weeks beginning March 31, 1968 through June 29, 1968 under section 1252.1 of the code on the ground that he was not an unemployed commercial fisherman. Prior to the issuance of any decision in Referee's Case No. LB-14873, we assumed jurisdiction of the matter under section 1336 of the code.

It appearing that the facts and circumstances are the same or similar and no substantial right of any party will be prejudiced, these two cases have been consolidated for consideration and decision under section 5107 of Title 22 of the California Administrative Code. Claimant Austin presented

written argument in Case No. 69-265 but the department did not, having already submitted a memorandum of its chief counsel dated March 29, 1968. This memorandum was accepted into the record in Case No. 68-4859 in which claimant Taormina presented reply written argument.

STATEMENT OF FACTS

Claimants Taormina and Austin are both commercial fishermen who are the sole owners of their own unincorporated commercial fishing boats. They have applied for and been granted elective coverage under section 708(a) of the Unemployment Insurance Code.

Claimant Taormina owns the 44-foot boat "Coquetta." He has not performed work in employment for anyone else since he has owned his own boat beginning in 1949. Each year he fishes for albacore tuna and swordfish beginning about the middle of June or early July and ending in October or November. He then goes bottom fishing for rock cod until late in March. He has had his brothers or other men working for him as a crew but both because of low earnings and the difficulty of obtaining competent men, claimant Taormina has been fishing for rock cod alone. He uses a hook and line for rock cod which he has located at depths of 300 to 700 feet in the Pacific Ocean off St. Nicholas and San Miguel Islands. Because he has to stand to fish and do all of the baiting of gear and icing of the fish himself, wind rocking the boat makes the work difficult to do alone.

On his last fishing trip before filing his claim for benefits effective March 24, 1968, claimant Taormina fished alone from March 12 to March 23 and unloaded his fish on March 25. He sold his fish from that trip for \$200 gross. His operating expenses had been \$125 and he worked 291 hours for a net profit of \$75 or for about 25 cents an hour. Because of the low profits and the trade winds beginning late in March, he tied up his boat at the dock and did not fish until June 17, 1968 when he went to the Santa Cruz Island area for rock cod. Claimant Taormina testified fish were being caught while he was claiming benefits during the 11 weeks involved in this appeal. However, the fish were being caught by younger or stronger men and on boats with several crew members. He acknowledged that he probably

could have gone out in spite of the weather but did not want to because of his low earnings. His boat was not equipped with nets and seines and crew as other boats were during this period to fish for mackerel, sardines or anchovies.

Claimant Austin owns the 60-foot boat "Pisces" and usually fishes by bait or trawling. He has been a commercial fisherman since 1935 and has not performed work in employment for anyone else since he bought his first boat in 1938. Claimant Austin's main fishing is for albacore tuna in waters off Mexico, California, Oregon and Washington. He also has fished for squid, shark and rock cod. He hires a crew of from one to five employees, depending upon the nature and extent of the fishing trip. He pays them a percentage of the returns from the catch of from seven to as high as 15 percent, depending upon the number and skill of the crew, and the balance he retains for his services and the use of the boat.

Beginning in December 1967, claimant Austin fished for rock cod until about February 1968 when he went to fish for tuna off the coast of Mexico. He returned from Mexico about February 14, 1968 because the fishing conditions and the competition from larger boats using nets, which the claimant did not have, made further tuna fishing unprofitable at that time. He brought his boat in and overhauled the refrigeration system. Although the department gained the impression that claimant Austin was working on his boat when he filed his claim, he testified that all the repairs to the boat had been completed prior to the time he filed his claim for benefits effective March 31, 1968. During the 13 weeks for which claimant Austin claimed benefits he did not fish and he did not take his boat out. There might have been fish available, but these were in such small quantities, particularly in competition with boats using nets, that he considered it would not be worth his while and that he could not meet expenses taking his boat out. As more boats went out, the price of the rock cod went down on the local market. While he would have been willing to take work elsewhere, he did not wish to leave his boat tied up while on an extended trip for fear it might be damaged during his absence. Claimant Austin was not concerned about weather during this period as he made a practice to "take it as it comes."

The manager of the San Pedro office of the department testified in both cases that other similar commercial boats were going out during the periods involved in the appeals and catching fish for sale on the local market. Therefore, the San Pedro Office Manager contended that the claimants were not totally unemployed commercial fishermen within the meaning of section 1252.1 of the code since their boats were tied up because of anticipated low earnings from competition and not for reasons of inclement weather or absence of fish in fishable waters. The manager contended also, in accordance with the position set forth in the March 29, 1968 memorandum of the chief counsel of the department, that self-employed commercial fishermen who have elected coverage under section 708(a) of the code hire themselves and are governed by sections 1252.1 and 1252.2 of the code in the same manner as commercial fishermen who have incorporated their boats.

The questions before us for consideration are:

1. Whether claimants Taormina and Austin, as self-employed commercial fishermen who have elected coverage under section 708(a) of the code, are unemployed within the meaning of section 1252 of the code, or
2. Entitled to claim benefits under sections 1252.1 and 1252.2 of the code on the same basis as commercial fishermen who have incorporated their boats, and, if so, whether they are totally or partially unemployed fishermen under those code sections?

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides that unemployment compensation benefits are payable from the Unemployment Fund to unemployed individuals. Section 1252 of the code provides as follows:

"1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him

with respect to that week are less than his weekly benefit amount. Authorized regulations shall be prescribed making such distinctions as may be necessary in the procedures applicable to unemployed individuals as to total unemployment, part-total employment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work. For the purpose of this section only the term 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor."

In Benefit Decision No. 5622 and subsequent decisions we have followed the California Attorney General's Opinion No. 50/76 (15 Ops. Cal. Atty. Gen. 311) which concluded that self-employed persons and independent contractors are "unemployed" insofar as they are not performing "services" but that the net income of a self-employed person constituted "wages." So long as the "wages" of a self-employed individual are less than his weekly benefit amount, he is "unemployed" (Benefit Decisions Nos. 5633, 5903, 6114, 6177, 6231, 6669, 6679 and 6707).

For the first time in Benefit Decision No. 6669, and thereafter in Benefit Decision Nos. 6679, 6707 and 6819, we considered the circumstances of independent contractors or self-employed individuals who had elective coverage under the code. In Benefit Decisions Nos. 6669, 6679 and 6707, we followed the views set forth in the Attorney General's Opinion and held that the claimants were "unemployed" within the meaning of section 1252 of the code and that their eligibility for benefits should be considered under the availability for work and search for work provisions of the code. In Benefit Decision No. 6707, however, for the limited purpose of deciding the claimant's eligibility for benefits under the availability for work and search for work provisions of subsections (c) and (e) of section 1253 of the code, we considered the services the claimant performed as a swimming pool, cement and gunting contractor as "work" because the claimant had been granted elective coverage. We held that the claimant in Benefit Decision No. 6707 could restrict to his contracting work because the evidence established prospects of obtaining such work were good. We modified the views expressed about "work" in Benefit Decision No. 6679 accordingly, but not the results reached because in that case the evidence showed prospects for "work" in the claimant's

boat business were not good so that the claimant should have been willing to make himself available for other work.

In Benefit Decision No. 6819 we again recognized the views set forth in the Attorney General's Opinion and distinguished the circumstances of an independent contractor or a self-employed individual from those of a corporation officer and general manager who could control his own "wages" and thus in Benefit Decision No. 6696 such an officer was held to be not "unemployed." However, we further held in Benefit Decision No. 6819 that the fact that the self-employed individual or independent contractor who had elective coverage did not have wages or net income equivalent to or in excess of his weekly benefit amount was not the only criteria to be used in establishing whether he was "unemployed." We held that a more reasonable interpretation would be to consider the claimant was fully employed as a building contractor commencing with the date he was granted and performed work under a contract and continuing until the terms of the contract were completed.

In Benefit Decisions Nos. 6669, 6679, 6707 and 6819, we did not specifically consider the express language relating to "employment" set forth in the elective coverage provisions of the code. Section 708(a) of the code, as amended, provides in pertinent part:

"708. (a) Any individual who is an employer under this division or any two or more individuals who have so qualified may file with the director a written election that their services shall be deemed to be services performed by individuals in employment for an employer for all the purposes of this division. Upon approval of the election by the director the services of such individuals shall be deemed to constitute employment for an employer for all the purposes of this division. . . ." (emphasis added)

Almost identical language has been contained in the previous provisions for elective coverage contained in both the Unemployment Insurance Code and the predecessor Unemployment Insurance Act. Because of this express

language, it is our opinion that individuals who have applied for and been granted elective coverage in effect employ themselves, and their services constitute work and employment not only within the meaning of section 1253 of the code but also section 1252 and other relevant code sections defining the term "unemployed." The views expressed in Benefit Decisions Nos. 6669, 6679, 6707 and 6819 are modified accordingly and the Attorney General's Opinion and our decisions with respect to independent contractors and self-employed individuals who have not elected coverage are distinguished.

In addition, because we have recognized those individuals with elective coverage as in employment for themselves and because they do have some control over their own employment similar to the officers and executive employees of corporations, we further conclude that similar standards should be used in deciding whether such covered independent contractors and self-employed individuals are "unemployed" at any particular time. The views expressed in Benefit Decisions Nos. 6696 and 6819 distinguishing these situations are accordingly modified. A realistic approach should be used in deciding in each case whether an individual claimant is or is not "unemployed" (Benefit Decisions Nos. 6718, 6814 and 6818).

The commercial fishermen in the present two cases are self-employed individual employers who have elective coverage. In deciding whether they are or are not "unemployed," it is our opinion that we should use the same rules as apply to commercial fishermen employed by corporations or other employing units subject to the code. Their total factual situation should be considered, however, including their normal pattern of making a living as commercial fishermen as well as the fact that they have some control over their own employment similar to skippers who may have incorporated their own boats.

As pointed out in Appeals Board Decision No. P-B-48, historically, commercial fishermen have had difficulty in establishing that they are "unemployed," whether totally, part-totally, or partially, because of their contingent method of compensation, and the resulting lack of any definite relationship between hours of work and earnings. Claimants Taormina and Austin remained skippers responsible for their own boats at all times and in effect were "standing by" in their own employment during the periods

for which they claimed benefits. They made their own decisions not to fish while other boats were going out. In accordance with the views expressed in Benefit Decisions Nos. 5066 and 5999 we hold that they were not unemployed within the meaning of section 1252 of the code. Appeals Board Decision No. P-B-48, in which the claimant's chief engineer had no substantial duties to perform for a short period while his boat was being repaired is distinguishable on its facts.

However, as commercial fishermen who had elective coverage and were still attached in employment to their regular employers, themselves, claimants Taormina and Austin were entitled to claim benefits as commercial fishermen under section 1252.1 or section 1252.2 of the code, provided these sections were otherwise applicable. Section 1252.2 of the code has no application to the present cases since neither claimant during the periods involved was "in the act of catching or attempting to catch fish."

Section 1252.1 of the Unemployment Insurance Code provides as follows:

"1252.1 With respect to individuals hired as commercial fishermen a 'totally unemployed individual' means an individual who, during a particular week, while still attached to his employer from the standpoint that there did not occur any severance of the employer-employee relationship, earned no wages and performed no services because his employer's boat was tied up for one or more of the following reasons:

- "(a) Inclement weather.
- "(b) Absence of fish in fishable waters.
- "(c) Lack of orders for fish from buyers.
- "(d) Boat is laid up for repairs."

Section 1252.1-1 of Title 22 of the California Administrative Code provides as follows:

"1252.1-1 Totally Unemployed Commercial Fishermen. (a) 'Commercial fishermen' means individuals who are members of a crew of a vessel, engaged in the capture of fish for sale and not in pleasure or sport fishing.

"(b) 'Inclement weather' means weather of such severity as would cause a reasonable master to refrain from making a fishing voyage.

"(c) 'Absence of fish in fishable waters' means such a scarcity of fish in the normal fishing waters as would cause a reasonable master to refrain from making a fishing voyage.

"(d) 'Lack of orders for fish from buyers' means that the owner or operator of the vessel is without a commitment from a buyer of fish to purchase the vessel's catch in the event of a fishing voyage.

"(e) 'Boat is laid up for repairs' means that the vessel is inactive because it is either undergoing repairs or unseaworthy and awaiting repairs."

Considering all of the evidence in these two cases we conclude that since other commercial fishermen were going out in boats similar to the claimants' boats and catching fish for sale in the local market, the claimants' boats were not tied up for any of the reasons specified in section 1252.1 of the Unemployment Insurance Code. Therefore they were not unemployed commercial fishermen and benefits must be denied. The fact that they may have considered fishing unprofitable during the periods they claimed benefits, as not due to any of the reasons set forth in the code, may not be considered in deciding whether they were or were not "unemployed" (Benefit Decision No. 6601).

In our discussion of the issues presented in these two cases we have assumed that the claimants were properly granted elective coverage under section 708(a) of the code. We do point out that the fact that claimant Taormina was fishing alone at least for rock cod raises some question as to whether he should be considered an employer for the

purposes of section 708(a) of the code or whether he may only be eligible to elect coverage for disability benefits alone under section 708.5 of the code. This question is referred to the department for its consideration.

DECISION

Referee's Decision No. LB-15064 with respect to claimant Taormina (Case No. 68-4859), and the determination of the Department of Employment in Referee's Case No. LB-14873 with respect to claimant Austin (Case No. 69-265) are affirmed. Benefits are denied to the claimants under section 1252.1 of the code.

Sacramento, California, August 12, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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